IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1366 of 1999
With
CRIMINAL APPEAL No. 34 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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KAMALPRASAD RAMAJIPRASAD GUPTA & 1 - Appellants
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MRS SHILPA R SHAH for Appellants.
MR RC KODEKAR, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 21/09/2006
COMMON ORAL JUDGMENT

(**Per : HONOURABLE MR.JUSTICE K. A. PUJ**)

1. Since both these appeals are filed against the same judgment and order dated 06.12.1999 passed by the learned Additional Sessions Judge, Vadodara in NDPS Case No. 07 of 1998 and since both these appeals are heard together, the same are being disposed of by this common judgment.

2. Criminal Appeal No. 1366 of 1999 is filed by the appellants – original accused Nos. 1 & 2 through jail who are convicted under Section 20 (b) (ii) of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as “the Act”) and ordered to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs and in default thereof, further simple imprisonment

of one year.

3. Criminal Appeal No. 34 of 2000 is filed by the State of Gujarat against the respondent – original accused No. 3 who was acquitted from the charges levelled against him, by the very judgment and order dated 06.12.1999.

4. The brief facts giving rise to these two appeals are as under :-

5. That the Assistant Commissioner of Police had received an information on 05.03.1998 that the accused Nos. 1 & 2 are in illegal possession of narcotics substance being charas and they were staying in Santosh Nivas Lodge, Vadodara. The police raided the premises and in Room No. 22 of the said lodge, original accused No. 1 was found in possession of 13 pieces of charas and original accused No. 2 was found in possession of 6 pieces of charas. The weight

of 13 pieces of charas found from the accused No. 1 was about 6,615 grams and its value was about Rs.1,65,000/-. The weight of 6 pieces of charas found from the possession of the accused No. 2 was about 3040 grams and its value was about Rs. 76,000/-. The raiding party has collected the muddamal articles and panchnamas were drawn at the place of offence. Mr. Z.A. Thakur, Police-sub-Inspector has lodged the complaint and muddamal articles were sent to Vadi Police Station for safe custody. Based on the said complaint, offence was registered and immediately articles were sent for analysis to Forensic Science Laboratory, Surat and on receipt of the F.S.L. Report, the investigation was handed over to Shri C.B. Patel, Vadi Police Station.

6. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of

the witnesses were recorded, panchnama of scene of offence was prepared, muddamal articles and clothes of the accused were recovered by drawing panchnama which were sent to F.S.L. for chemical analysis. After obtaining F.S.L. Report, since sufficient incriminating evidence was found against the accused, they were charge-sheeted in the Court of learned Additional Sessions Judge, Vadodara. The learned Additional Sessions Judge, Vadodara framed charge against the accused for commission of the offence punishable under Section 20 (b) (ii) of the Act.

7. The charge was read over and explained to the accused as the accused have not pleaded guilty to the said charge. They were put to trial and tried by the learned Additional Sessions Judge, Vadodara in NDPS Case No. 7 of 1998.

8. To prove the culpability of the accused, prosecution has in all examined as many as 9 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Vadodara explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

9. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Vadodara has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused Nos. 1 & 2 was proved and, therefore, the accused

Nos. 1 & 2 were held guilty of the offence punishable under Section 20 (b) (ii) of the Act. The learned Additional Sessions Judge, Vadodara has, however, acquitted the accused No. 3 from the charge levelled against him. Thereafter, the learned Additional Sessions Judge, Vadodara heard the accused and their advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, original accused Nos. 1 & 2 were sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, simple imprisonment of one year.

10. Ms. Shilpa R. Shah, learned advocate appearing for the appellants – original accused Nos. 1 & 2 has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge, Vadodara dated 06.12.1999. She has submitted that the learned Additional

Sessions Judge has erred in convicting the appellants though there was no cogent or adequate evidence showing their guilt in the matter. She has further submitted that the learned Additional Sessions Judge, Vadodara has failed to appreciate that the appellants are innocent and have not committed the alleged offence. The information was not reduced to writing and provisions contained in Section 42 of the Act were not complied with. The panchas were not asked any question about compliance of Section 50 of the Act. She has further submitted that the sealing procedure was not properly followed by the raiding party and there were numerous discrepancies and contradictions in the depositions of the panch witnesses as well as police witnesses. There was also very vital difference about sealing muddamal articles in the version of the panch witnesses, police witnesses and F.S.L. Report. She has, therefore, submitted that the appellants – accused could not have been convicted on the

basis of F.S.L. Report identifying muddamal as contraband goods.

11. In support of her submission that the sealing procedure was not properly followed and there were serious lapses, she relied on the decision of this Court in the case of **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409** wherein after considering earlier three decisions of this Court, namely, (1) Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153, (2) unreported decision dated 17.08.2001 rendered in Criminal Appeal No. 323 of 1996 filed by Jitendra @ Sanjaykumar Suryakant Desai against State of Gujarat and (3) decision dated 07.05.2002 rendered in Criminal Appeal No. 287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat, the Court held that as per the law laid down by this Court, the slips bearing signatures of the panch-witnesses should be affixed on samples

and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn. On re-appreciation of evidence, the Court was satisfied that correct and fool-proof procedure of sealing was not resorted to by the Investigating Officer and possibility of tampering with muddamals was not ruled out at all. The Court has evaluated such deficiency in light of other discrepancies brought on record of the case and held that it was difficult to sustain conviction of the appellant – accused. The appeal was accordingly allowed and the appellant – accused was ordered to be released from jail forthwith unless his presence in jail was needed with reference to any other case.

12. Mr. R.C. Kodekar, learned Additional Public Prosecutor appearing for State of Gujarat, on the other hand, supported the order and judgment of the learned Additional Sessions Judge and submitted that there was no

violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 42 as well as 50 of the Act were violated. In support of his contention, he relied on the decision of the Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others V/s. State of Gujarat, 2005 (8) SCC 725** and in the case of **G. Srinivas Goud V/s. State of Andhra Pradesh, 2005 (8) SCC 183**. So far as sealing procedure is concerned, he has submitted that the learned Additional Sessions Judge has discussed at length this issue in the impugned judgment and order and he has come to the right conclusion that there was no violation of the sealing procedure. He has also considered various authorities cited before him and after considering the same, he has arrived at a conclusion that the sealing procedure was properly followed and the appellants were

rightly convicted.

13.While arguing the appeal filed by the State of Gujarat against original accused No. 3, Mr. Kodekar has submitted that the learned Additional Sessions Judge has not properly appreciated the oral as well as documentary evidence in its true perspective. He has erred in coming to the conclusion that prosecution has failed to prove the case against the accused No. 3. He has further erred in coming to the conclusion that the accused No. 3 was not present in the room at the time of raid and, therefore, he was entitled to acquittal. He has further erred in coming to the conclusion that the prosecution has failed to prove that accused No. 3 has helped the original accused Nos. 1 & 2 in keeping the muddamal substance. The prosecution has also failed to prove with regard to abatment in commission of offence. The learned Additional Sessions Judge should have appreciated that on the basis of

information received by Assistant Commissioner of Police, raid was arranged and during the raid, original accused No. 1 was found in possession of 13 pieces of charas which was weighed 6,615 grams and valued at Rs.1,65,000/- and original accused No. 2 was found in possession of 6 pieces of charas which was weighed 3,040 grams and valued at Rs.70,000/- and the respondent - accused No. 3 had helped the respondent Nos. 1 & 2 in keeping the muddamal substance. It is, therefore, clearly proved that the accused No. 3 had abated the offence.

14. Criminal Appeal No. 1366 of 1999 was admitted on 26.04.2000 and bail was refused on the ground that conviction is under the relevant provisions of the NDPS Act. However, hearing of the appeal was expedited bearing in mind the fact that the appellant – accused No. 2 was a female convict with a child aged about 3 years at that time. The Court has also ordered to hear this appeal with

Criminal Appeal No. 34 of 2000 filed by State of Gujarat.

15.Similarly, Criminal Appeal No. 34 of 2000 was admitted on 26.04.2000. Bailable warrant in the sum of Rs. 10,000/- was issued with a liberty to the State to move appropriate application for imposition of any other or further conditions of bail. Process is not served on the original accused No. 3 and bailable warrant is also not executed till this date. No appearance has been filed on behalf of original accused No. 3.

16.We have considered the submissions advanced by Ms. Shilpa R. Shah, learned advocate appearing for the appellants – original accused Nos. 1 & 2 and Mr. R.C. Kodekar, learned Additional Public Prosecutor appearing for State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all

vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional Sessions Judge, Vadodara convicting the accused Nos. 1 & 2 and acquitting the accused No. 3.

17. Though several contentions were raised before the Trial Court and before this Court, we confine ourselves to deal with the strong protest lodged against sealing procedure adopted by the prosecution. Even otherwise, we are not impressed by the other contentions raised by her. The main grievance was that the identity of the muddamal and the samples sent to the F.S.L. is not established. There was a possibility of tampering with the contents of the samples. The samples were not kept in safe and proper custody and the sealing procedure was absolutely defective.

There is difference in the inscription of the seals used for sealing samples and so misuse of the seal for tampering the contents of the sample cannot be ruled out.

18. To examine and appreciate this contention, relevant provisions in the Act or Rules made thereunder touching this subject matter are required to be looked into. Section 55 of the Act deals with Police to take charge of articles seized and delivered. It provides that Officer in charge of police station shall allow any officer depositing the seized articles to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Except this, no provision seems to have been made in the present Act and Rules framed thereunder regarding mode of taking and sealing of the sample, mode of assigning the same to chemical examiner and their chemical examination or even touching the

above matters. However, the Central Government issued Standing Instruction / Orders. Standing Order No. 1/88 dated 15.03.1988, Standing Order No. 2/88 dated 11.04.1988 and Standing Order No. 1/89 dated 13.06.1989 are required to be looked into. Standing Instruction 1/88 speaks about procedure regarding drawl, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substances. Standing Order No. 2/88 deals with receipt, custody, storage and disposal of seized/confiscated narcotic drugs and psychotropic substances. Standing Order No. 1/89 relates to general procedure for sampling, storage etc. Standing Instruction / Order No. 1/88 inter alia provides as under :-

(i) If the drugs seized are found in packages/containers, the same should be serially numbered for purpose of identification etc.

(ii) Samples must be drawn on the spot of recovery in duplicate, in the presence of search (panch) witnesses and the person from whose possession the drug is recovered.

(iii) The quantity to be drawn in each sample should be 5 gms in respect of all narcotic drugs and psychotropic substances except in the cases of opium, ganja and charas, hashish where a quantity of 24 gms in each case is required. The same quantity should be taken for the duplicate samples also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

(iv) In the case of seizure of a single package/container one sample in duplicate is to be drawn. In case of seizure of more than one packages/container one sample in duplicate from each package/container should be drawn.

(v) All samples must be drawn and sealed in the presence of the accused, panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose possession the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and duplicate of each sample.

(vi) The sample in duplicate should be kept in heat sealed plastic bags. The plastic bags should be kept in a paper envelope and properly sealed. Such sealed envelope should be marked as original and duplicate.

(vii) The samples should be dispatched to the respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB-1.

19.Despite the aforesaid Standing Orders /

Instructions, the proper procedures are not being followed by the Investigating Agency and cases have come up before the Court. In the case of **Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153**, this Court has taken the view that the muddamal was not properly sealed and there was all possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with the police for more than two months raises a doubt. The prosecution has, therefore, failed to establish the offence beyond reasonable doubt against the appellant. The Court further held that this aspect has escaped the notice of the Learned Trial Judge and in view thereof, the Court allowed the appeal and acquitted the appellants.

20. In **Criminal Appeal No. 323 of 1996, in the case of Jitendra @ Sanjaykumar Suryakant Desai V/s. State of Gujarat** decided on 17.08.2001, the Court has taken the view that

the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. After considering the evidence of the Investigating Officer and Panch witnesses, the Court has observed that after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of

sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done in that case, the possibility of tampering cannot be ruled out. Under the circumstances, the Court held that the procedure followed for sealing in that case cannot be said to be proper and free from any possibility of tempering. The procedure,therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

21.This Court has again considered this issue in **Criminal Appeal No. 287 of 1999 in the case of Ganpatram Punmaram Vishnoi V/s. State of Gujarat** decided on 07.05.2002 Additional

Public Prosecutor, as an officer of the Court, has pointed out in the case that no proper sealing has been done by the PSO and, therefore, possibility of tampering with the muddamal cannot be ruled out. The Court took the view in that case that the slip signed by the panchas as well as the PSO, which was kept along with the polyethylene bag is required to be affixed at the outer portion below the wax seal of the police station. If the police keeps the slip signed by the panchas and the PSO along with the sample muddamal and affix the seal of the police station at the outer portion of the bag, possibility of tampering the muddamal cannot be ruled out as the official seal always remains with the concerned police station. The Court, therefore, held that it is obligatory on the part of the police to see to it that the slip signed by the panchas as well as the concerned Officer is affixed at the outer portion of the sample bag below the official seal of the

police station. This procedure will totally rule out the possibility of any tampering with the sample muddamal. This has not been done in that case and hence, the Court held that the procedure adopted by the PSO cannot be said to be free from any doubt and the possibility of the tampering also cannot be ruled out. The Court held that in any case, the benefit must go to the accused.

22.All the aforesaid three judgments have been referred to and relied upon by this Court in its later decision in the case of **Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409** and held that the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn.

23.If we consider the procedure laid down in

the aforesaid Standing Instruction / Order as well as the ratio of above referred four different judgments of this Court, in light of the facts found from the deposition of the Panch witnesses, Police witnesses and F.S.L. Report as well as from the documents produced on record, we have no hesitation in coming to the conclusion that in the present case also, proper procedure has not been followed by the prosecution. Zahirmiya Thakur – P.W. 1 – Exh. 13 has deposed that 13 pieces of charas were divided in two parts. They were put into two plastic bags and max seal was applied. The plastic bag was put in cloth bag and it was stitched with cotton threads. Slip duly signed by Panchas and Assistant Commissioner of Police was put and seal of Vadi Police Station was applied. Vinuben B. Machhi, P.W. No. 2 – Exh. 20 has stated in her deposition that muddamal articles were sent in a tin and tin was sealed. However, that tin was never found in the police station. She has further stated that she saw

the accused No. 2 for the first time in Vadi Police Station. Panchnama was also prepared in Vadi Police station and it was signed by her at Vadi Police station. There were lot of discrepancies in her deposition. Shivshankar K. Nayar – P.W. 3 – Exh. 22 has stated that muddamal articles were kept in plastic bag. The bag was wrapped by papers and it was kept in cloth bag. Slip duly signed by Panchas and ACP was put in a cotton bag and a round seal was affixed on it. Panchnama - Exh. 24 of the scene of offence was drawn and discrepancies were also found between the contents of the panchnama as well as the depositions of the witnesses. In F.S.L. Report dated 30.04.1998 Mark 57, it is observed that sealed parcels containing muddamal articles Mark A & B in cloth bags, paper slips were found. It is further stated that mark A cloth bag was stitched with cotton threads and there were two plastic bags which were given Mark A/1 and A/2. In Mark A plastic bag, there were 13 pieces of

charas which were given Mark A/1 -1 to A/1-13. In Mark A/2 plastic bag which was wrapped with white paper, there were certain pieces of cloths. The detailed description of this F.S.L. Report indicates that slips were loosely kept in the cloth bag and it was not affixed on each of the plastic bags. This report makes it abundantly clear that the procedure has not been followed by the Investigating Agency. Because of the material contradictions between the depositions of the prosecution witnesses regarding the inscription of the seal and sealing procedure, this Court is of the view that there were all possibility of tampering with the contents of the sample before they were sent to F.S.L. for analysis. When there is possibility of tampering with the contents of the sample, then no reliance can be placed on the expert opinion and the report of the F.S.L. and it cannot be said that the contraband articles were seized from the possession of the accused and that the sample

therefrom was taken and that the sample was sent for analysis and that the report of the expert is regarding the same. When it is so, then the report deserves to be discarded in toto. Standing Instructions issued by the Central Government are violated as it has not come in evidence from the deposition of any of the prosecution witnesses that the accused have also signed the slips which were found in the cloth bags containing the samples. In light of these discrepancies, it is very unsafe to sustain the conviction order. Both the accused are arrested in October, 1998. Almost 8 years are about to be over. It is very unfortunate that the appeal could not be heard earlier. The agony of the accused No. 2 who was having a child aged about 3 years at the time of her arrest can as well be understood.

24. In peculiar facts of the present case and in light of the decisions referred to herein above and the principles laid down therein,

this Court is of the view that the conviction order passed against the accused Nos. 1 & 2 cannot be sustained. The Appeal, therefore, succeeds. The order of the learned Additional Sessions Judge, Vadodara dated 06.12.1999 passed in NDPS Case No. 7 of 1998 convicting the accused Nos. 1 & 2 for offences punishable under Section 20 (b) (ii) of the Act and sentencing them to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs and in default thereof, simple imprisonment for one year for commission of such offence is hereby quashed and set aside. The appellants – original accused Nos. 1 & 2 are hereby acquitted from the charges levelled against them. The respondent – State of Gujarat and the jail authority is hereby directed to release the appellants – original accused Nos. 1 & 2 from jail forthwith unless their presence is required in connection with any other case. Amount of fine, if paid shall be refunded to them.

25. In Criminal Appeal No. 34 of 2000 filed by the State of Gujarat, though the respondent – original accused No. 3 did not appear before this Court and bailable warrant issued by this Court earlier has not been executed, since we have taken the view that no case was made out against the original accused Nos. 1 & 2 because of deficiencies in the sealing procedure, the same shall hold good with regard to this appeal and hence, the appeal filed by the State of Gujarat against the order acquitting the accused No. 3 is hereby dismissed. Bailable Warrant issued against him earlier stands cancelled.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

Savariya